Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1525

NEREUS SHIPPING, S.A.,
Petitioner,
against
COMPANIA ESPANOLA DE PETROLEOS, SA.,
Respondent.

NEREUS SHIPPING, S.A.,
Petitioner,
against
HIDROCARBUROS Y DERIVADOS, C.A.,
Respondent,
and
COMPANIA ESPANOLA DE PETROLEOS, SA.,
Respondent.

In the Matter of the Arbitration
between
NEREUS SHIPPING, S.A.,
Petitioner,
against
HIDROCARBUROS Y DERIVADOS, C.A.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT HIDROCARBUROS Y DERIVADOS, C.A. IN OPPOSITION

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Opinions Below

The opinion of the court of appeals is officially reported at 527 F.2d 966. The other citations and copies of the opinions are contained in the Petition for a Writ of Certiorari of Petitioner Nereus Shipping, S.A. (the "Petition").

Questions Presented

The Petition misstates the nature of the legal issues involved in these cases, which are more accurately stated as follows:

1. Do federal courts have the power to order consolidation of related arbitrations?
2. Is an order consolidating two related arbitrations contrary to the provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*?
3. Is an order consolidating two related arbitrations contrary, expressly or in principle, to prior Supreme Court and other federal decisions?

Statement of the Case

On December 12, 1975, the Court of Appeals for the Second Circuit decided appeals from two decisions of the District Court for the Southern District of New York dated December 18, 1974 (the "First Decision") and March 21, 1975 (the "Second Decision"). Respondent sets forth a statement of the case and the salient facts because of certain inaccuracies and misleading statements contained in the Petition.

In the First Decision the district court in an action by Compania Espanola de Petroleos, S.A. ("Cepsa"), against Nereus Shipping, S.A. ("Nereus"), held that Cepsa as guarantor of a charter party was obliged under the terms of its Guaranty to arbitrate under that charter party. In the Second Decision, the district court, in an action by Hidrocarburos y Derivados, C.A. ("Hideca") against Nereus and Cepsa to set the order of arbitrations and a Petition to Appoint an Arbitrator, ordered consolidation of the two related arbitrations initiated under the single charter party.

All the proceedings to date have related solely to procedural matters. However, the record reveals the relevant facts underlying the decisions of the district court and court of appeals to be as follows:

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Nereus as Owner and Hideca as Charterer entered into a contract of affreightment dated January 4, 1971 (the "Contract") which provided for the chartering of oil tankers by Hideca from Nereus to carry a total of approximately 600,000 tons of crude oil per year for three years. The Guaranty dated June 24, 1971 and also labeled Addendum No. 2 to the Contract provided a guaranty by Cepsa of Hideca's performance under the Contract.

During the course of the Contract, disputes arose between Hideca and Nereus regarding actions taken by both parties and the interpretation of certain contract terms and procedures. One of the disputes erupted in July 1974 concerning the 17th voyage under the Contract. During discussions concerning a possible resolution of the dispute, Nereus sought a court order in Casablanca, Morocco, for the attachment of a cargo of crude oil belonging to Hideca being carried in one of Nereus's ships. Although Nereus had no right under the Contract for such an attachment, it succeeded in obtaining the order, which, fortunately proved to be defective when execution of it was attempted. Shortly thereafter, Nereus notified Cepsa on July 24, 1974, that it was calling upon Nereus to perform Hideca's obligations under the Contract.

In August 1974, an arbitration between Hideca and Nereus was commenced, and in September 1974 Nereus served a demand for arbitration on Cepsa. Cepsa rejected Nereus's demand and, on November 22, 1974, moved in the district court to enjoin the arbitration between Nereus and Cepsa on the grounds that (a) Cepsa was not subject to the arbitration clause of the Contract, (b) the arbitration between Nereus and Cepsa could only proceed should Hideca default with respect to its obligations under the Contract, including the arbitration provision thereof and (c) the panel was improperly constituted, there being no arbitrable dispute between Nereus and Cepsa at the time of its appointment.

On December 18, 1974, the First Decision held that the Guaranty had incorporated the arbitration clause of the

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Contract and that Cepsa had consented to arbitrate disputes under the Contract.[1]

The two arbitrations involve the same maritime contract and the same facts and issues, since Hideca's default or Nereus's breach is a central issue in both arbitrations.[2] Accordingly, once Cepsa was found to be under a duty to arbitrate, Hideca's attorneys suggested to Nereus's attorneys that the arbitrations be consolidated to save time, avoid inconsistent results and insure that all disputes would be settled. In January 1975 Nereus's attorneys responded that they intended to proceed with the arbitration against Cepsa and that they were not interested in arbitrating with Hideca because they regarded Cepsa as better able to pay an award.[3]

On February 5, 1975, fearful that the Nereus-Cepsa arbitration would proceed with a panel chosen by Nereus to

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[1] The First Decision also stated that

". . . [D]efendant alleges that Hideca defaulted in its performance of the contract during the third year. That dispute is the subject of *separate arbitration proceedings by Hideca against defendant Nereus;* there is apparently no contention that these arbitration proceedings were improperly brought and, *in any event, they are not presently before us*" (emphasis supplied). 385 F.Supp. at 1156.

[2] The Guaranty states in part:

"[W]e . . . hereby agree that, *should Hideca default in payment or performance of its obligations under the Charter Party,* we will perform the balance of the contract and assume the rights and obligations of Hideca on the same terms and conditions as contained in the Charter Party."

[3] The court of appeals stated:

". . . Nereus began to implement its strategy to have the Cepsa arbitration proceed first and the Hideca arbitration come later. If successful this strategy would be very advantageous to Nereus and very prejudicial to Hideca and Cepsa as the critical question or congeries of questions to be decided by the arbitrators relative to the alleged default by Hideca would be first decided in an arbitration to which Hideca was not a party, despite the fact that Hideca had access to the evidence relative to the alleged default and Cepsa did not." 527 F.2d at 970.

hear and decide the issues of Hideca's and Nereus's performance of the Contract and that the Hideca-Nereus arbitration would not proceed at all for failure to have a full panel appointed, Hideca started an action against Nereus and Cepsa to stay the Nereus-Cepsa arbitration and instituted a supplementary proceeding against Nereus to obtain appointment of a third arbitrator to the Hideca-Nereus panel.

On March 21, 1975, the Second Decision consolidated the two arbitrations instituted under the Contract by providing that each of the three parties (Owner, Charterer and Guarantor) would appoint one arbitrator and those three arbitrators would appoint two others to decide all claims and questions under the Contract. The district court held it had the power to consolidate the two related arbitrations and that this was a proper case to do so. The court of appeals affirmed both decisions with slight modifications.[4]

Argument

The decision of the court of appeals affirming the consolidation of related arbitrations under a single contract ordered by the district court was a procedural decision correctly employing the power of the federal courts to facilitate arbitration after both courts found there was no prejudice or harm to any party involved. There is no important question of federal law and the decision does not conflict expressly or in principle with the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, decisions of this Court or of the court of appeals.

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[4] The modification of the First Decision removed the arbitration panel chosen entirely by Nereus at a time when Cepsa was challenging its duty to arbitrate and the modification of the Second Decision set forth time limits for the appointment of the panel of arbitrators and provided that the last two arbitrators be chosen by a unanimous vote of the first three arbitrators selected. 527 F.2d at 971, 975.

POINT I

The court of appeals correctly held that the district court had the power to consolidate two related arbitrations.

The court of appeals held that the district court had the power to consolidate arbitrations and that this was a proper case:

> "because the two arbitrations had common questions of law and fact, and because the extensive and complicated issues were so intertwined and overlapping that it could have caused great and irreparable injustice had Judge Stewart ruled that the two arbitrations must proceed separately." 527 F.2d at 968.

The district court examined the situation carefully and expressly found that consolidation would result in no prejudice to any party.[5] The court of appeals after full and careful consideration of the issues also found that it had been "overwhelmingly demonstrated" that "consolidation was in the interest of justice." 527 F.2d at 974.

This case is apparently the first case of consolidation of maritime arbitrations to come before a court of appeals. Nevertheless, there is ample federal case authority for the propriety of consolidation using the principles of Rule 42(a) of the Federal Rules of Civil Procedure ("F.R.C.P.") in the absence of prejudice to any party. See, *e.g.*, *Robinson* v. *Warner*, 370 F.Supp. 828 (D.R.I. 1974); *Lavino Shipping Co.* v. *Santa Cecilia Co.*, 1972 A.M.C. 2454 (S.D.N.Y. 1972); *Chilean Nitrate* v. *Intermarine Corp.*, 1972 A.M.C. 2460 (S.D.N.Y. 1971); *cf. Showa Shipping Co.* v. *A/B Bellis*, 1972 A.M.C. 2458 (S.D.N.Y. 1972); see also *Vigo Steamship Corp.* v. *Marship Corp.*, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970).

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[5] Judge Stewart stated: "Moreover, we do not believe that any party will be prejudiced by a consolidation of the two arbitration proceedings." Appendix to Petition at 10a.

In this case, the district court, in the proper exercise of its discretion as the court of appeals held, weighed the possible inconsistent results, complicated and overlapping issues of law and fact, waste of time and resources and prejudice to Hideca and concluded that consolidation was appropriate and without harm to any party. Since the arbitration clause of the Contract as written only contemplates two parties—an Owner and a Charterer—it was within the discretion of the district court to resolve the ambiguity of how all parties would participate in a single arbitration and resolve all questions under the Contract. The district court did not fashion a new arbitration procedure or submission but preserved all the elements of the arbitration procedure provided by the Contract provisions and at the same time resolved the ambiguity of the arbitration provision as it related to the Guarantor. *Cf. Lehigh Coal & Navigation Co.* v. *Central R. of New Jersey,* 33 F.Supp. 362, 367 (E.D. Pa. 1940).

It is inconceivable that this decision could or will adversely affect any future litigants or parties to arbitrations. Consolidation of related arbitrations after a review of the situation as in this case is certainly within the power of the federal courts. The decision merely fosters and encourages swift and fair arbitrations through consolidation of intricately related arbitrations when justice is served and no prejudice is shown to any objecting party.

POINT II

The decision of the court of appeals affirming the district court's order of consolidation of arbitrations is not contrary to the Federal Arbitration Act.

The Petitioner attempts to characterize the consolidation of arbitrations ordered in this case as an order compelling arbitration in a manner contrary to the arbitration clause of the Contract and therefore in conflict with the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* However, the Petitioner has never denied that it must arbitrate with both

respondents. Instead it seeks to claim a legal right to arbitrate overlapping issues of fact and law separately with each of them. The court of appeals accurately characterized the objection of the Petitioner as that of "pursuing a course that we think was gravely prejudicial to Hideca and Cepsa." 527 F.2d at 974.

In the Federal Arbitration Act:

> "Congress has expressed a strong policy favoring arbitration before litigation, and the courts are bound to take notice of this broad policy as well as specific statutory provisions in dealing with arbitration clauses in contracts." *J.S. & H. Construction Co.* v. *Richmond County Hospital Authority,* 473 F.2d 212, 214-15 (5th Cir. 1973).

The Federal Arbitration Act is thus a vehicle to enable the courts to facilitate arbitration as a means "to expedite the disposition of commercial disputes". *Petition of Dover Steamship Company,* 143 F.Supp. 738, 740 (S.D.N.Y. 1956).

The three cases cited by Petitioner interpreting the Federal Arbitration Act contain general language about arbitration but do not stand for the proposition that the Federal Arbitration Act is a bar to consolidation. The issue in each of *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506 (1974) and *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), was whether or not to allow federal court litigation to proceed or to stay litigation and enforce an arbitration agreement.[6] In *A/S Ganger Rolf* v. *Zeeland Transportation, Ltd.,* 191 F.Supp. 359 (S.D.N.Y. 1961), one party sought to compel arbitration under the Federal Arbitration Act.

Neither the Federal Arbitration Act nor the cases cited deal, either directly or indirectly with consolidation of arbi-

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[6] In *Scherk* this Court held that an objecting party had to arbitrate even though there were alleged violations of the Securities Exchange Act of 1934, and in *Prima Paint Corp.* this Court held a claim of fraud in the inducement of a contract should be heard by arbitration.

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trations. The rule that courts will not compel arbitration under Section 4 of the Act, 9 U.S.C. § 4, when the arbitration clause is self-executing with no need for court intervention has no bearing on whether or not a court in an appropriate case may order consolidation of arbitrations. There is thus no basis for concluding that the Federal Arbitration Act prohibits or is inconsistent with granting consolidation of arbitrations in a case such as this.

POINT III

The decision of the court of appeals, affirming the district court's order of consolidation of arbitrations, is not contrary to prior federal court decisions.

The decision in this case by the court of appeals is not contrary to federal court decisions on arbitration cited by Petitioner either expressly or by inference.

The Petition quotes cases for the proposition that arbitration is a creature of contract. Such cases all deal with whether there was an agreement to arbitrate[7] and are clearly not in any way in conflict with the decision in this case.

The two consolidation of arbitration cases cited by the Petitioner, *Symphony Fabrics Corp.* v. *Bernson Silk Mills, Inc.*, 16 A.D.2d 473, 229 N.Y.S.2d 200 (1st Dep't 1962), *aff'd* 12 N.Y. 2d 409, 190 N.E.2d 418, 240 N.Y.S.2d 23 (1963), and *Stewart Tenants Corp.* v. *Diesel Construction Co.*, 16 A.D. 2d 895, 229 N.Y.S.2d 204 (1st Dep't 1962), clearly point to the correctness of the decisions below in this case. In *Symphony Fabrics Corp.*, the Appellate Division of the New York Supreme Court ordered consolidation of two arbitrations under two separate contracts for the purchase and sale of substantially the same textiles in the absence of substantial prejudice. That court found that both contracts called for similar arbitration proceedings before the

[7] *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Ocean Industries, Inc.* v. *Soros Associates International, Inc.*, 328 F.Supp. 944 (S.D.N.Y. 1971).

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American Arbitration Association. In *Stewart Tenants Corp.*, the same court refused to consolidate two arbitration proceedings between the same parties because one contract provided for arbitration before the American Arbitration Association and one by an appointee of the Real Estate Board of New York, Inc.

The only cases cited by Petitioner in support of its argument that the court of appeals did not have the power to remove the panel selected by Nereus in the Nereus-Cepsa arbitration are cases in which it was held that arbitrators cannot be removed *on the grounds of bias* after the proceedings have begun.[8] In this case the court of appeals correctly removed the panel of arbitrators selected by Nereus "to free Cepsa from any unnecessary prejudice as a result of its having made a good faith challenge to its duty to arbitrate." 527 F.2d at 971. The removal of the panel resulted from an appropriate exercise by a federal court of its discretion to make recourse to arbitration more effective and just through consolidation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[8] *San Carlo Opera Co.* v. *Conley*, 72 F.Supp. 825 (S.D.N.Y. 1946), language expressly labeled *dictum*, *aff'd* 163 F.2d 310 (2d Cir. 1947); *Sanko S.S. Co., Ltd.* v. *Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973).

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